No. 89-1531

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1989

EARLE A. PARTINGTON,

Petitioner,

v.

JOSEPH M. GEDAN and HOWARD T. CHANG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' SUPPLEMENTAL MEMORANDUM AND MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE SUGGESTION OF MOOTNESS

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

CORINNE K.A. WATANABE
First Deputy Attorney General
State of Hawaii

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

Counsel for Respondents
(Petitioners in No. 89-1506)

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No. 89-1531

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EARLE A PARTINGTON,

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JOSEPH M. GEDAN and HOWARD T. CHANG,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' SUPPLEMENTAL MEMORANDUM AND MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE SUGGESTION OF MOOTNESS

Respondents Joseph M. Gedan, Special Master appointed by the Supreme Court of Hawaii, et al., respectfully submit this memorandum in opposition to the Motion to Strike Suggestion of Mootness dated May 14, 1990, filed by Petitioner Earle A. Partington in No. 89-1531, and to bring to the Court's attention pursuant to Rule 15.7 potentially relevant events in the Hawaii courts and courts below since filing of Respondents' Opposition.

I. STATEMENT

Following *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), the Brief in Opposition focuses on "the situation that existed on the morning of [March 9, 1987,] when this case was filed in the United States District Court." *Id.* at 17 (*see* Resp. Br. at 2 n.1, 28 n.5). Nonetheless, because of the importance of informing this Court of any matters that might bear on "what issues would properly be before the Court if certiorari were granted," Respondents have briefed the Court on developments in the state courts following the denial of rehearing by the Ninth Circuit. *See* Rule 15.1 and Resp. Br. at 2 n.1, 16-17. Petitioner's motion to strike the suggestion of mootness made in the Brief in Opposition in light of the waiver of the attorney/client privilege effected by Petitioner's former client (Resp. App. "J" (No. 89-1531)), seeks to raise in this Court added developments in the state courts. To see why these developments not only merit denial of the motion to strike, but fortify the reasons why the Petition itself in No. 89-1531 should be denied, it is important to review what has, and has not yet, occurred in the state courts, and the courts below, since April 26, 1990.

1. Following the filing of Respondents' Brief in No. 89-1531, Petitioner, at his deposition on May 1, 1990, in the Rule 13 proceedings, took the official position that, despite Clarke's waiver of the attorney/client privilege, the privilege still applied. The Special Master overruled the objection, and Partington still refused to testify. On May 2, 1990, the Rule 13 Prosecutor moved in the Supreme Court of Hawaii for an order that would compel Partington to testify. On May 15, 1990, the Hawaii Supreme Court denied the motion to compel, apparently

believing that Partington had invoked his Fifth Amendment rights against self-incrimination. The Court emphasized, however, that "attorney Partington shall be afforded full opportunity to appear [at the Rule 13 proceeding] and present evidence and arguments on his behalf." On May 16, 1990, the Rule 13 Prosecutor moved to have that ruling reconsidered, as Partington had made clear that he has not relied on his privilege against self-incrimination. On May 23, 1990, the Supreme Court of Hawaii denied the motion for reconsideration. It did not change its earlier ruling that "Partington shall be afforded full opportunity to appear and present evidence and arguments." *See* Resp. Supp. App. "K," "L," "M," and "N," *infra*.

2. Meanwhile, on April 28, 1990, Partington moved in the United States Court of Appeals for the Ninth Circuit, in the action below, for an order imposing sanctions upon the appellees in that case, Respondents here, for their response, sent to the court of appeals on April 26, 1990,[1] to a motion to recall the mandate and for other relief filed April 20, 1990. In that response, the State Officials suggested to the Ninth Circuit, as they did here, that Clarke's waiver of the attorney/client privilege had mooted many if not all of Partington's underlying claims, and, a fortiori, any basis for overcoming *Younger* abstention. On May 11, 1990, Partington's motions to recall the mandate and for Rule 11 sanctions were denied by the panel. Resp. Supp. App. "O" and "P," attached *infra*.[2]

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[1] Respondents' opposition to the petition in No. 89-1531 was also due in this Court on April 26, 1990. *See* Pet. Motion at 2.

[2] On May 9, 1990, the District Court, in the action below, entered an order denying Petitioner's motion for preliminary

(Continued on following page)

II. ARGUMENT

Partington's motion to strike the suggestion of mootness in No. 89-1531 is inappropriate and should be denied. Even if the Supreme Court of Hawaii's recent orders do not unambiguously moot the attorney/client privilege question that forms the basis of many if not all of Partington's underlying federal claims, the suggestion of mootness was made in good faith, and remains an important reason why review should be denied in No. 89-1531.

The panel below, in denying Partington's motion to recall the mandate and for appellate sanctions, rightly came to this conclusion, and so should this Court. Indeed, while invoking this Court's rule authorizing the striking of briefs that contain "burdensome, irrelevant, immaterial and scandalous matter," Petitioner's arguments demonstrate that abstention was always, and remains, appropriate, as "the validity of the purported waiver is presently in controversy and will continue to be litigated in the state courts." Motion to Strike at 2. Petitioner's motion, and the recent developments in the state courts, only confirm that abstention was, and remains, proper.

(Continued from previous page)

injunction in connection with his motion for Rule 60(b) relief, to which the motion to recall the mandate was related. That day, May 9, 1990, Partington filed an emergency motion in the United States Court of Appeals for the Ninth Circuit seeking review of the District Court's denial, in a second federal action, *Lau v. Lum*, No. 89-0400 (D. Haw. amended Mar. 1, 1990), on May 3, 1990, of *ex parte* motions for temporary restraining orders or, in the alternative, expedited setting of a motion for preliminary injunction of the Rule 13 proceedings here. On May 25, 1990, the *Lau* appeal was dismissed and the emergency motion was denied.

A. A Suggestion of Mootness Was and Remains Appropriate.

As suggested in the Brief in Opposition, many if not all of Petitioner's arguments for overcoming *Younger* abstention turn on the asserted procedural inhospitality in the state courts that purports to arise from the attorney/client privilege. *See* Resp. Br. at 22-24, 28; *see also* Pet. at 12, 14-16, 20, n.1 & n.24.

Although, for the reasons raised in the Brief in Opposition, irrespective of Clarke's waiver of the privilege these arguments plainly do not generate any ground for overcoming abstention, or otherwise justifying review, it was fully appropriate for the Attorney General to suggest these privilege issues are moot:

> [C]ounsel . . . have a "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation. *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring). When a development . . . could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court *without delay*. . . .

Board of License Commissioners v. Pastore, 469 U.S. 238, 240 (1985) (per curiam) (emphasis on "without delay" in original); *see Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249 (1990); *see also* this Court's Rule 15.1. Here, a suggestion of mootness is especially apt as the suggestion "concerns the effect of the voluntary acts of a third-party nondefendant." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 72 (1982) (per curiam).

Petitioner's argument that the privilege issue is not moot rests on the claim that "[r]espondents have not carried their heavy burden of proving waiver" [Motion at

2]. Yet a close perusal of the written waiver signed by Clarke on April 20, 1990, shows it to be, on its face, full and complete. The waiver form acknowledges the existence of the privilege, and in the face of that knowledge, "expressly release[es] Earle Partington and any representative of Earle Partington from claiming the lawyer-client privilege with regard to" four of the five areas of Partington's conduct that provided the basis for the retrial in the *Clarke* case. Resp. App. 57-59 (No. 89-1531). The form states "this waiver may be held not to be a limited waiver, but rather a waiver as to all confidential communications" and states "that my current attorney, Christopher R. Evans, has fully explained to me all matters set forth in this waiver, and I make this waiver freely, voluntarily, and intelligently." Resp. App. 59 (No. 89-1531). Petitioner makes no claim that Clarke was mentally incompetent or otherwise legally incapacitated when he made this waiver. Under the Hawaii rules of evidence, the client is deemed to waive the privilege if he "voluntarily discloses or consents to disclosure of any significant part of the privileged matter." Haw. R. Evid. 511. This waiver authority is in addition to the "self-defense" exceptions codified both in Hawaii's disciplinary rules, 880 F.2d at 120-24, and in Haw. R. Evid. 503(d)(3). Not only did Clarke "consent to disclosure," in his discussions with the Rule 13 prosecutor Clarke discussed various of his conversations with Petitioner concerning the tactics at his murder trial. *See* Mem. at 3-4 and citations therein, No. 10041 (Haw. May 2, 1990) (Resp. Supp. App. 4-5); *see also* Resp. Supp. App. 22-24. Indeed, as noted in the Brief in Opposition, Clarke in fact waived the privilege as a matter of law as early as October 30, 1984, when he disclosed to the state Circuit Court the tactical basis for Petitioner's

refusal to make a closing argument ("a tactic to find pitty from the Jury"), and stated that "I made the wrong decision in agreeing with my lawyer" as "I did want a closing." *See* Resp. Br. at 12 (citing to Resp. App. 21 (No. 89-1531)).

Petitioner's motion to strike asserts that "[s]erious ethical questions have been raised regarding the circumstances under which the purported waiver was obtained," but does not provide any authority for suggesting that these "questions" render the waivers ineffective for present purposes. Petitioner cites no Hawaii case that allows the privilege, once waived, to be "reinvoked," and such "reinvocation" arguments are at best novel.

Petitioner's suggestion that the waiver is ineffective, which is nowhere supported clearly in the motion to strike, appears to rest on the premise that Mr. Evans, the counsel who advised Clarke on the waiver, did not know "what Mr. Partington would say if the attorney/client privilege were waived" (*see* Aff. of Samuel P. King, Jr., at ¶8 (Exh. 1 to Exh. "B" to Motion to Strike)). This argument is simply illogical. Whatever Clarke told Evans about what Partington knows, Clarke knows what he said to Partington. Indeed, even assuming that the standards of *Edwards v. Arizona*, 451 U.S. 477 (1981), are at all applicable in this context, there is simply no authority for the view that the type of disclosure Petitioner appears to believe necessary would be required. Indeed, this Court has never held *Edwards* to " 'require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.' " *Colorado v. Spring*, 479 U.S. 564,

576-77 (1987); *see also Duckworth v. Eagan*, 109 S. Ct. 2875, 2879-80 (1989).

Of course, as stated in the Brief in Opposition, Petitioner's assertion of Clarke's Sixth Amendment interest in confidentiality is especially inapt insofar as Partington's and Clarke's interests in the privilege are directly opposing, and thus Partington's standing to raise Clarke's Sixth Amendment claims is dubious at the least. Moreover, Clarke himself has no Sixth Amendment interest in this context as he has been reconvicted, and does not stand "accused" of any new crimes to which the Sixth Amendment applies, let alone the subject of specific prosecution attempts to use any information against him. Resp. Br. at 23 (citing authorities); *see also United States v. Gouveia*, 467 U.S. 180, 188-92 (1984). Finally, Partington did not firmly press the "privilege" issue below as one implicating anyone's Sixth Amendment "privilege." Petitioner's effort to impart federal "overtones" to the privilege issue is "spurious." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985). Indeed, as the Hawaii Supreme Court ruled on May 15, 1990, and let stand by its order of May 23, 1990, "attorney Partington shall be afforded full opportunity to appear and present evidence and arguments on his behalf." As the record stands, there is no impediment to his voluntary testimony.[3]

Given this record, it is fully appropriate for the Attorney General to suggest that any issues arising out of the attorney/client privilege are moot. Partington's fears that he may be subject to discipline for improperly disclosing

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[3] This is confirmed by the May 15, 1990, denial of Clarke's motion to stay the Rule 13 case pending Clarke's "reconsideration" of whether he should stand by his privilege waiver.

client confidences (*see* Resp. Supp. App. 37) are "simply too remote from the present controversy to keep this [issue] alive." *Iron Arrow*, 464 U.S. at 71. Petitioner's bases for seeking review simply do not exist.

B. The Recent Developments Only Confirm that The Court Below Was Required to Abstain.

Petitioner's Motion to Strike also fundamentally ignores that one of the central bases of the judgment below, of which he seeks review, "is *Pennzoil's* requirement that the attorney-client privilege must be shown by 'unambiguous' authority to bar disclosure of the evidence Partington asserts he needs," Resp. Br. at 24. For in asserting that "the validity of the purported waiver is presently in controversy and will continue to be litigated in the state courts" (Motion to Strike at 2), Petitioner only confirms that abstention was, and remains, required under this Court's settled precedents. Thus, even if Petitioner takes the Supreme Court of Hawaii's express assurance that he may have "full opportunity to appear and present evidence and arguments" as not unambiguously *mooting* the attorney/client privilege issue, he has still not shown that state law unambiguously *bars* presentation of the information he claims he needs to defend himself. Insofar as Clarke's waivers now raise at the least another ground (in addition to the "self-defense" exceptions to the privilege) by which the "privilege stymie" issue may be eliminated in the state courts, abstention is even more forcefully compelled than when this case was decided below. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987); *Partington v. Gedan*, 880 F.2d 116, 123 (9th Cir. 1989) (citing *Pennzoil*).

The claim that matter bearing on Clarke's waiver of the attorney/client privilege is "burdensome, irrelevant,

immaterial [or] scandalous" (Rule 24.6) is untenable.[4] In fact, the matter confirms that the writ in No. 89-1531 ought be denied.

III. CONCLUSION

For the reasons above and in the Brief in Opposition, the Motion to Strike and the Writ in No. 89-1531 should be denied.

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

CORINNE K.A. WATANABE
First Deputy Attorney General
State of Hawaii

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

Counsel for Respondents
(Petitioners in No. 89-1506)

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[4] A review of the past thirty years' of this Court's rulings suggests that this Court has not in its recent history granted a motion to strike like that here. *E.g., Matthews v. United States*, 429 U.S. 1121 (1977); *Love v. Dade County*, 423 U.S. 876 (1975); *Fiorini v. Wayne Circuit Judge*, 414 U.S. 982 (1973); *Haffke v. California*, 401 U.S. 1014 (1971); *Loptein v. City of Sycamore*, 393 U.S. 11 (1968); *Delaney v. United Services Life Insurance Co.*, 385 U.S. 846 (1966); *Neering v. Florida*, 377 U.S. 980 (1964); *Reichert v. Borough of Schuylkill Haven*, 369 U.S. 889 (1962); *Coduto v. United States*, 365 U.S. 881 (1961).

APPENDIX "K"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR. Defendant-Appellant.	)	CR. NO. 59285 First Circuit Court State of Hawaii
IN RE: EARLE A. PARTINGTON	)	

FILED 1990 MAY 2 P 3:24
Eugene L. Sabado
CLERK SUPREME COURT

EMERGENCY APPLICATION AND MOTION TO THE* SUPREME COURT FOR AN ORDER PURSUANT TO RULE 37 OF THE HAWAII RULES OF CIVIL PROCEDURE

Mark J. Bennett, the Rule 13 Prosecutor, pursuant to Rule 37 of the Hawaii Rules of Civil Procedure, asks this Court for an order directed to Earle A. Partington, directing him to answer each and every question asked him by the Rule 13 prosecutor in his deposition of May 1, 1990, which he refused to answer. A copy of the transcript of the deposition, which has been adjourned pursuant to Rule 37(a)(2), is attached to the accompanying Affidavit

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* Cover, proposed order, certificate, and other matter deleted in printing

of Mark J. Bennett as Exhibit "A". This Emergency Application and Motion is based upon the attached Memorandum of Law, the attached Affidavit of Mark J. Bennett, the attached Affidavit of Christopher Evans, the attached Exhibits, and the files and records of this case.

Wherefore, the Rule 13 Prosecutor respectfully asks this Court for an Order pursuant to Rule 37 of the Hawaii Rules of Civil Procedure, as set forth above, and as set forth in the accompanying Memorandum of Law.

DATED: Honolulu, Hawaii, MAY 2 1990.

/s/ Mark J. Bennett
MARK J. BENNETT
Rule 13 Prosecutor

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR. Defendant-Appellant.	)	CR. NO. 59285 First Circuit Court State of Hawaii
IN RE: EARLE A. PARTINGTON	)	

MEMORANDUM OF LAW

The instant proceeding against Earle A. Partington is being conducted pursuant to Rule 13 of the Rules of the Hawaii Supreme Court. That Rule provides that there may be discovery conducted in accordance with the discovery chapter of the Hawaii Rules of Civil Procedure. The Master in this case, Joseph Gedan, has entered an Order allowing discovery, and set a discovery cutoff date of May 15, 1990.

The Rule 13 Prosecutor noticed the deposition of Earle A. Partington for May 1, 1990. A copy of the transcript of the deposition is attached as Exhibit A to the Affidavit of Mark J. Bennett. Pursuant to an order filed in this case, the Master agreed to preside over the deposition. As the transcript shows, Partington was asked a number of questions by Bennett, which he refused to answer. The Master ordered Partington to answer each and every one of the questions. Partington still refused. Some questions could arguably call for matters covered

by the lawyer-client privilege. However, in this case, the lawyer-client privilege, as to those questions has been waived. Many questions do not call for answers even arguably covered by the lawyer-client privilege.

Rule 503 of the Hawaii Rules of Evidence sets forth the lawyer-client privilege. As stated in Rule 503(b), the privilege belongs to the client, who may refuse to disclose such matters, and may prevent any other person from disclosing such matters. Rule 503(c) states that the lawyer shall claim the privilege unless expressly released by the client. Rule 503(d)(3) states that there is no privilege under this rule as "to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer. . . ." Rule 511 states: "A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is a privileged communication."

The Rule 13 Prosecutor has already filed in this Court a waiver signed by Clifford M. M. Clarke, Sr. A copy of that waiver is attached as Exhibit B to Mark J. Bennett's Affidavit. In the waiver, Clarke specifically states that pursuant to Rule 503(c) of the Federal Rules of Evidence, he releases Partington and any of Partington's representatives from claiming the lawyer-client privilege with regard to any confidential communications in three areas, dealing with opening statement, the testimony of Debralin Arcala, and closing argument. A transcript of an interview between Bennett, Clarke, and Clarke's attorney, Christopher Evans, was filed in the Supreme Court and

clearly demonstrates that Clarke discussed and disclosed all confidential communications he had with Partington in each of the three areas set out in his waiver.

In addition, attached to this Memorandum is the Affidavit of Christopher Evans. In this affidavit, Evans states that he has reviewed the transcript of the Partington deposition, and in particular, each of the questions which Partington refused to answer. He states that he does not believe that there is any lawyer-client privilege currently in existence, as to responses called for by any of these questions. He also makes clear that despite representations to him, by Partington, that Partington would hurt Clarke, if Clarke waived the privilege, Evans explained these matters to Clarke, and Clarke voluntarily waived the privilege.

Partington made other objections, all overruled by the Master. The Rule 13 prosecutor believes it is clear that these proceedings are legal and constitutional. Partington has claimed that *Matsuo v. State*, 70 Haw. ___, (No. 13488, Aug. 11, 1989) renders these proceedings unconstitutional. *Matsuo*, however, applies to post-conviction proceedings, and the Clarke's conviction was reversed on direct appeal; *Matsuo* is thus inapplicable. And, *Matsuo*, even were it relevant, has no bearing on the constitutionality of these proceedings.

Rule 37(a)(1) of the Hawaii Rules of Civil Procedure, which governs discovery orders, provides that when an application is for an order to a party, it may be made to the court in which the action is pending. This action is clearly pending before the Supreme Court. Rule 37(a)(2) provides that in the case of a deponent who refuses to

answer questions, the proponent of the unanswered questions may move for an order compelling answers. That Rule also provides that when an oral deposition is being taken, the proponent of the unanswered questions may adjourn the proceeding before he applies for an order to compel. In this case, the Rule 13 Prosecutor adjourned the deposition, pending a ruling on this Emergency Application.

Rule 26(b)(1), governing the scope of discovery, provides that parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . .It is not ground for objection that the information sought would be inadmissable at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." It is absolutely clear that the questions to Earle A. Partington are relevant to the subject matter of this Rule 13 proceeding.

The Rule 13 Prosecutor believes that most of the questions asked do not call for the disclosure of any privileged communications whatsoever. The Rule 13 Prosecutor believes that without even considering the question of privilege, this Court should order Partington to answer those questions.

There are questions which call for the disclosure of privileged communications. The Rule 13 Prosecutor believes, however, that as to these questions, the privilege was explicitly waived, by means of the form signed by Clarke, in the presence of his attorney. In addition, the privilege as to these matters was waived by Clarke's voluntary disclosure of the contents of the privileged

communications, or substantial parts of those communications, to the Rule 13 Prosecutor. In addition, the Court has the affidavit of Clarke's attorney, Christopher Evans, who himself has stated that he has reviewed the deposition transcript and believes that to the extent it requests privileged communications, the privilege has been waived. There is no legitimate basis for Partington refusing to answer the questions propounded to him.

While it is not entirely clear what the time limits for a response to this motion are, the Rule 13 Prosecutor will assume that pursuant to Rule 27(a) of the Hawaii Rules of Appellate Procedure, Partington has five days to respond. However, because the discovery cutoff in this case is May 15, 1990, the Rule 13 Prosecutor respectfully asks this Court to consider shortening the amount of time for respondent to this application as provided for in Rule 27(a) and Rule 26(d).

Wherefore, the Rule 13 Prosecutor respectfully asks this Court to grant this Emergency Application and Motion.

DATED: Honolulu, Hawaii, MAY 2 1990.

/s/ Mark J. Bennett
MARK J. BENNETT
Rule 13 Prosecutor

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR. Defendant-Appellant.	)	CR. NO. 59285 First Circuit Court State of Hawaii
IN RE: EARLE A. PARTINGTON	)	

AFFIDAVIT OF MARK J. BENNETT;
EXHIBITS A & B

STATE OF HAWAII	)	
	)	SS.
CITY AND COUNTY OF HONOLULU	)	

MARK J. BENNETT, being first duly sworn on oath, deposes and says on personal knowledge:

1. I am the prosecutor appointed in this matter pursuant to Rule 13 of the Rules of the Hawaii Supreme Court.

2. All of the facts set forth in the accompanying Memorandum of Law are true and correct to the best of my knowledge.

3. Attached as Exhibit A to my affidavit is a copy of the transcript of the May 1, 1990 deposition of Earle A. Partington. Attached as Exhibit B to this affidavit is a

copy of the Limited Waiver of the Lawyer-Client Privilege signed by Clifford M. M. Clarke, Sr.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Mark J. Bennett
MARK J. BENNETT
Rule 13 Prosecutor

Subscribed and sworn to before me
this 2nd day of May, 1990

/s/ Charlene S. Shimabukuro
Notary Public, State of Hawaii

My commission expires: 10/25/93

EXHIBIT "A"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR. Defendant-Appellant.	)	CR. NO. 59285 First Circuit Court State of Hawaii
IN RE: EARLE A. PARTINGTON	)	

(p.1) DEPOSITION OF EARLE ARTHUR PARTINGTON

Taken by the Rule 13 Prosecutor at the Law Offices of McCorriston Miho & Miller, Five Waterfront Plaza, Honolulu, Hawaii, commencing at 9:00 a.m., on Tuesday, May 1, 1990, pursuant to Notice. BEFORE: Colin J. Campbell, CSR No. 301

State of Hawaii

[material deleted in printing]

(p.3) DOREEN KAISER: If you want to raise your hand. Do you swear that you –

MR. PARTINGTON: I do. I'll tell the truth.

MR. BENNETT: Is that good enough?

MR. PARTINGTON: Yes.

DOREEN KAISER: You swear to tell the truth, the whole truth and nothing but the truth?

MR. PARTINGTON: I do. I do.

MASTER GEDAN: Off the record for a second.

(Discussion had off the record.)

EARLE ARTHUR PARTINGTON

called as a witness by the Rule 13 Prosecutor, being first duly sworn by Doreen Kaiser, Notary Public, State of Hawaii, was examined and testified as follows:

EXAMINATION

BY MARK J. BENNETT:

Q Mr. Partington, can you state your full name, please?

A. Earle Arthur Partington.

Q And your date of birth?

A February 14, 1942.

Q And where do you currently reside?

(p.4) A Mr. Bennett, I'd like to state for the record that this entire deposition is being conducted in violation of the Constitution of the United States and the State of Hawaii.

I would point out to you that on the 18th of April Mr. Gedan, the Special Master who is present here, ruled that there are no findings against me, there are no charges,

there are no allegations against me. Therefore, there is nothing for me to answer.

Further, this entire proceeding is an invasion of my First, Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution and the equivalent rights under the State Constitution.

I would point out that this is an entirely bad faith proceeding, brought solely for the purpose of harassing me, and other criminal defense attorneys in Hawaii to prevent us from zealously and ethically representing our clients.

You have no right to have me here. There is nothing for me to answer. I do not understand what the purpose of this hearing is.

I would point out to you that yesterday in the Ninth Circuit I filed another motion for (p.5) sanctions against Mr. Gedan, and apparently Mr. Michaels is treating you now as being fully substituted into Partington v Gedan, Ninth Circuit, and I ask for sanctions against you since Mr. Michaels has appeared in your behalf. I have noted there have been some very serious misrepresentations made by Mr. Michaels, and I would inform both of you that I believe you are in jeopardy of sanctions being imposed.

I can only state that this proceeding appears to be brought soley for the purpose of harassing me, and I see no purpose in continuing. I will not answer that question or any other question.

MASTER GEDAN: If that's an objection, I overrule the objection, Mr. Partington.

A I refuse to answer.

MASTER GEDAN: Wait, wait, let me finish my ruling. The matters you have discussed have been resolved by you action in the United States District Court, which has resulted in a dismissal. So the Ninth Circuit has ruled that this proceeding effectively can proceed. This deposition is nothing but an extension of that proceeding. So your objection is overruled.

(p.6) A I would point out to you that In Re: Ruffalo, the United States Supreme Court held that no attorney may be subjected to a disciplinary proceeding without notice of the charge or allegation. As I have no notice of any charge or allegation, and you yourself have stated there is none, this proceeding is unconstitutional.

Q (By Mr. Bennett) Mr. Partington, can you tell me your address?

All right. Mr. Gedan, I'm going to put on the record all of the questions which I wish to put to Mr. Partington –

MASTER GEDAN: Mr. Partington, you're not answering the question?

A I am not answering any further questions, and if Mr. Bennett intends to keep me here for some length of time I intend to use this as evidence that the Supreme Court of Hawaii and its agents are using this proceeding solely for the purpose of harassing me. I will not answer any further questions. Continuing this deposition is a waste of time. And if I'm kept here the two of you are on notice that I will use this as evidence of the bad faith by

the Supreme Court of Hawaii in attempting to harass me and other criminal defense (p. 7) attorneys in Hawaii to keep us from doing our constitutional duty to our clients.

MR. BENNETT: Mr. Gedan, what I'm going to, because I'm required to under Rule 37 of the Hawaii Rules of Civil Procedure, I'm going to put on the record the questions that I'd like to put to Mr. Partington, and I would ask, rather than we have to interrupt after every question, for a continuing order from you to Mr. Partington to answer those questions.

MASTER GEDAN: I don't know about a continuing order. I will direct Mr. Partington to answer that question.

A I will refuse to answer that question on the grounds of the Sixth amendment, in particular the right of independent counsel, the presumption of effective assistance of counsel, and the right of attorney-client privilege, as well as the First, Fifth and Fourteenth Amendments to the United States Constitution and the equivalent provisions of the State Constitution.

MASTER GEDAN: Objection overruled. Mr. Partington, if you decline to answer any questions, I will rule that those grounds may be, you need not state those grounds, but those grounds will be (p. 8) indeed the basis upon which, if you want, that any questions you refuse to answer are not answered, so that you don't have to repeat the authorities and the rationale that you have stated.

A I suggest to save time, Mr. Bennett just go through all his questions.

MASTER GEDAN: I want to make sure that there are not any questions which you are –

A I will not answer any further questions, period.

MASTER GEDAN: Let's go through the questions then.

Q (By Mr. Bennett) Mr. Partington, could you describe your legal education and your secondary education, describing which colleges you attended and/or graduated, which law school or law schools you attended and/or graduated?

My next question is, Mr. Partington, could you describe what courts before which you are admitted to practice law, the years which you were so admitted and those jurisdictions in which you currently actively practice law.

My next question is if you could describe where you currently maintain the practice of law.

My next question is could you describe (p. 9) any disciplinary action that has ever been taken against you by any court judge, bar association or bar commission?

MASTER GEDAN: Mr. Partington, you can state any additional grounds you did not state to some of these other questions. I might indeed find those questions are inappropriate.

A I do find it interesting that a lot of the questions seem to be taken right out of my complaints in federal court. It seems frivolous to ask me questions about my legal education when my complaint in Lau v Lung [sic] sets out all of these as well as my bar admissions.

MASTER GEDAN: Are you objecting to the questions based upon – are you willing to stipulate –

A I'm not willing to do anything.

MR. BENNETT: Could I just finish my questions?

MASTER GEDAN: All right. All right. All right.

Q (By Mr. Bennett) Mr. Partington, at what point in the proceedings of the trial against Clifford Clarke where he was charged with murder were you appointed to represent him?

(p. 10) My next question is do you recall your first meeting with Mr. Clarke and the circumstances under which it took place?

My next question is did you discuss with Mr. Clarke how you would be conducting the defense in his case?

My next question is with regard to the testimony of Debra Lynn Arcala, am I correct that the record reflects that you objected to her testimony that you objected to cross-examining her without access to certain family court records, and that you requested the judge to allow you to begin your cross-examination of her during the State's case after you received those records?

My next question is with regard to your decision to ask the judge to recall Debra Lynn Arcala for cross-examination during the State's case after you received the records, did you discuss those matters with Clifford Clarke?

My next question is, if you did discuss those matters with Clifford Clarke, that is attempting to cross-examine Debra Lynn Arcala after you received the records but during the State's case, can you describe to me what you said to Mr. Clarke and what Mr. Clarke said to you?

(p. 11) A I'd like to put something on the record here since Mr. Bennett is getting into privileged matters under the attorney-client privilege. I call Mr. Bennett's attention to DR 4-101-C-1 of the Hawaii Code of Professional Responsibility, a DR apparently that Mr. Bennett was unaware of when he went with Mr. Clarke's present attorney on April 20 to Kalani correctional facility to talk to Mr. Clarke. I am particularly concerned to have discovered –

Q What rule was that?

A DR 4-101-C-1. I am particularly concerned to have discovered that apparently during the entire time that Mr. Evans was advising Clifford Clarke at Kalani correctional facility on April 20th Mr. Bennett was present and heard every word. This would indicate quite clearly that Mr. Evans had abandoned his client, and that any purported waiver is not worth the paper it's printed on.

I do want to place on record that Mr. Bennett has informed my partner that he was indeed present throughout the entire conversation between Christopher R. Evans, the purported attorney for Clifford M.M. Clarke, Sr.

(p. 12) MASTER GEDAN: Wait, wait, wait. Just a minute. Mr. Partington, you have expressed some doubt as to the competency of Mr. Evans in representing Mr. Clarke in this matter.

A I filed a formal complaint with the Office of Disciplinary Counsel.

MASTER GEDAN: Let me ask you this, did you discuss with Mr. Evans prior to the deposition some of the issues and some of the problems that you thought Mr. Clifford would be facing should he waive his privilege?

A The day or two before the April 20th interview I went to Mr. Evans and warned him in his office that if Mr. Clarke waives the privilege it was my professional opinion that my testimony would be harmful to Mr. Clarke. I informed him that if he was going to discuss waiver with Mr. Clarke he should get permission of Mr. Clarke for me to reveal to Mr. Evans what those confidences were. And that if he advised Clifford Clarke to waive the privilege without finding out what I would say and informing Clifford Clarke of that he could be accused of mal-practice. Mr. Evans informed me that he was going to talk with the criminal administrative judge, Judge Huddy, and telephone me (p. 13) back. Mr. Evans did not telephone me back. Mr. Evans did not discuss the matter further. Mr. Evans made no effort to find out what I would say if the privilege were waived. Mr. Evans' action can only be described as incompetent beyond description.

MASTER GEDAN: But you have fully explained to Mr. Evans what you thought the risks were if Mr. Clarke should waive his deposition?

A I could not explain the risks fully without disclosing the privileged communications, and as Mr. Clarke had not authorized me to do so, all I could do was warn Mr. Evans that in my opinion they were harmful and suggest that he get permission of Mr. Clarke for me to reveal to Mr. Evans what they were.

MASTER GEDAN: And – now do you have any knowledge that Mr. Evans did not discuss the subject matter of your conversation with Mr. Clarke?

A Yes. Mr. Evans has no idea what I would say. He's never asked me and I've never told him.

MASTER GEDAN: That is not my question. Have you been informed that Mr. Evans did not discuss the subject matter of your conversation (p. 14) with Mr. Evans with Mr. Clarke?

A Since Mr. Evans did not know what I'd say, he would be incapable of discussing it.

MASTER GEDAN: Well, you made –

A And I've never told Mr. Clarke what I would say, so Mr. Clarke does not know either.

MASTER GEDAN: I understand that. You have expressed some doubts to Mr. Evans about what you might say and how that might affect Mr. Clarke. Whatever you said to Mr. Evans, you have no knowledge that Mr. Evans did not discuss what you said to him as limited as it was with Mr. Clarke?

A I was not present. I do not know what was discussed. But Mr. Bennett has informed my partner that he was there throughout and heard the entire conversation

and can state what Mr. Evans informed Mr. Clarke. I find it appalling that an attorney would consult with a client with someone who has an adverse or at least a different interest. That in itself would amount to a waiver of the privilege and is another act of incompetence by Mr. Evans.

MASTER GEDAN: If you are now expressing objection because of attorney-client privilege, I rule that if such a privilege does exist in this (p. 15) case, which is questionable under the circumstances of this proceedings, that the waiver filed in this case specifically waives that, and that objection, any objection on that grounds is overruled.

MR. BENNETT: I will also put on the record with regard to what Mr. Partington said that when I met with Mr. Clarke and Mr. Evans with regard to Mr. Evans' preliminary discussion with Mr. Clarke before I began recording my interview with him, Mr. Evans asked Mr. Clarke whether he wanted to consult with him without me there. I indicated that I would be happy to leave if that's what he wanted to do. And Mr. Clarke's response was positively and absolutely he did not and that he wanted to have the conversation with Mr. Evans with me present. I will now move on.

[material deleted in printing]

CERTIFICATE

STATE OF HAWAII)
) ss.
COUNTY OF HONOLULU)

I, COLIN J. CAMPBELL, Certified Shorthand Reporter, State of Hawaii, do hereby certify:

That on Tuesday, May 1, 1990 at 9:00 a.m., there appeared before me Earle Arthur Partington, the witness whose deposition is contained herein; and that prior to being examined, he was sworn by Doreen Kaiser, a Notary Public, State of Hawaii;

That the deposition contained herein was by me taken in stenotype and thereafter reduced to typewriting; that the foregoing is a true and complete transcript of the testimony of said witness.

I further certify that I am not of counsel for any of the parties hereto, and that I am not in any way interested in the outcome of the cause named herein.

DATED this 1st day of May, 1989, at Honolulu, Hawaii.

/s/ Colin J. Campbell
COLIN J. CAMPBELL, CSR
No. 301
Court Reporter, State of
Hawaii

[further material deleted in printing]

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR. Defendant-Appellant.	)	CR. NO. 59285 First Circuit Court State of Hawaii
IN RE: EARLE A. PARTINGTON	)	

AFFIDAVIT OF CHRISTOPHER EVANS

STATE OF HAWAII CITY AND COUNTY OF HONOLULU	)	SS.

CHRISTOPHER EVANS, being first duly sworn on oath, deposes and says on personal knowledge:

1. I am the attorney for Clifford M. M. Clarke, Sr.

2. Rule 13 Prosecutor Mark J. Bennett approached me, and asked whether my client, Clifford Clarke, would be willing to talk to him regarding conversations that Mr. Clarke had had with his previous attorney, Earle A. Partington. Mr. Bennett informed me that if Clarke talked to him, it could be considered a waiver of the lawyer-client privilege as to all confidential communications between Clarke, Partington, and any representative of Partington's. I spoke to my client, Clifford Clarke, and he

informed me that he was willing to talk to Mr. Bennett, and was willing to waive the lawyer-client privilege.

3. Prior to my meeting with my client, I was visited by Earle Partington. Among other things, Partington told me that if Mr. Clarke waived the privilege, that he, Partington, would "hurt Clarke" by divulging confidential information that would be harmful to Clarke in his present situation, and in various other ways. Partington also informed me that if Clarke waived the privilege, he would make certain that the media was informed of everything that he would have to say, and this would hurt Clarke's parole chances, and would damage Clarke in various other ways.

4. On the telephone, I explained all these facts to Clarke. Clarke indicated to me that he still wished to waive the lawyer-client privilege.

5. On April 20, 1990, I met with Clifford Clarke, along with Mark Bennett. I told Clarke that Mr. Bennett wanted to tape record an interview with him. Before the tape recorded interview began, I explained to Clarke again, each and every thing that Mr. Partington had told me, including the fact that if Clarke waived the lawyer-client privilege, Partington claimed he would say things that would damage Clarke. I also explained the waiver document to Clarke, telling him specifically that while it was styled a limited waiver, a court could well construe it to be a total waiver of all privileged communications between Clarke, Partington, and any representative of Partington's. I specifically told Clarke that if he signed the waiver, and spoke to Mr. Bennett, he could be compelled to divulge all such privileged communications,

and Partington could similarly be compelled to divulge all such privileged communications. Clarke again informed me that he understood all of this, that he understood that by signing the waiver and speaking to Mr. Bennett he could be waiving the lawyer-client privilege as to all privileged communications between himself, Partington, and Partington's representative; that he understood that Partington had made statements that if he waived the privilege, Partington would disclose harmful information about Clarke; and he nevertheless said that he wanted to sign the waiver, and speak to Mr. Bennett. At this point, Mr. Bennett turned the tape recorder on, and conducted the interview with Clarke. I also participated.

6. I have reviewed a copy of the transcript of the May 1, 1990 deposition of Earle Partington. I do not believe that any question asked by Mr. Bennett called for the disclosure by Partington of any confidential communications not covered by Clarke's waiver.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Christopher Evans
CHRISTOPHER EVANS

Subscribed and sworn to before me
this 2nd day of May, 1990

/s/ Charlene S. Shimabukuro
Notary Public, State of Hawaii

My commission expires: 10/25/93

APPENDIX "L"

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285
IN RE EARLE A. PARTINGTON	

FILED
1990 MAY 15 P 2:12
Eugene L Sabado
CLERK SUPREME COURT

ORDER

Upon consideration of the "Emergency Application and Motion to the Supreme Court for an Order Pursuant to Rule 37 of the Hawaii Rules of Civil Procedure" filed by the Rule 13 Prosecutor, and the papers in support and opposition thereto; the "Motion for Disqualification or Recusal of the Present Justices . . . and for Appointment of Substitute Justices to hear [the] 'Emergency Application and Motion . . . ' " filed by attorney Earle A. Partington; and the "Motion to Stay Rule 13 Proceeding" filed by counsel appointed to represent Clifford Clarke in Family Court,

IT IS HEREBY ORDERED:

The Motion for Disqualification or Recusal of Justices is denied, without prejudice to the filing of a timely motion upon submission of the Special Master's decision and order to this court.

The Emergency Application for an Order Pursuant to Rule 37 is denied. Under the facts of this case, attorney Partington having invoked the Fifth Amendment, this court declines to compel the answering of questions by Partington at the subject deposition or at the Rule 13 hearing. Nonetheless attorney Partington shall be afforded full opportunity to appear and present evidence and arguments on his behalf. The Special Master shall in due course render his decision and proposed order pursuant to Rule 13, based on the record and any relevant evidence and argument offered by the Rule 13 Prosecutor and Partington.

The Motion to Stay Rule 13 Proceeding is denied.

DATED: Honolulu, Hawaii, May 15, 1990.

FOR THE COURT:

/s/ H. Lum
Chief Justice
[seal]

APPENDIX "M"

NO. 10041
IN THE SUPREME COURT OF THE
STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285 First Circuit Court State of Hawaii MOTION FOR RECON- SIDERATION; Exhibit A
IN RE: EARLE A. PARTINGTON	

FILED
1990 MAY 16 PM 4:23
Sandra M. Yasvi
CLERK SUPREME COURT

MOTION FOR RECONSIDERATION*

Mark J. Bennett, the Rule 13 prosecutor, files this Motion for Reconsideration. This Court issued an order on May 15, 1990 denying the Emergency Application for an Order Pursuant to Rule 37, made by the Rule 13 prosecutor. This Court denied the application on the ground that attorney Earle Partington had invoked the Fifth Amendment as a ground for refusing to answer

*Cover, exhibits, affidavit, and certificates deleted in printing.

questions. The Rule 13 prosecutor believes that the Court was under the impression that attorney Partington invoked his Fifth Amendment privilege against self-incrimination. If that is what attorney Partington had done, then of course the Court was correct in denying the Application. However, the Rule 13 prosecutor believes such was not the case.

Throughout this proceeding, and in the federal court actions initiated by attorney Partington, it has been Partington's claim that this proceeding violated his right under the Fifth Amendment to the Constitution not to be "deprived of life, liberty, or property without due process of law." There has never been any claim by Partington that the proceeding violated his Fifth Amendment privilege against self-incrimination. For example, in Partington's Second Amended Complaint for Declaratory and Injunctive Relief in *Lau v. Lum*, Civil No. 89-00400 ACK, filed in the United States District Court for the District of Hawaii (attached as Exhibit A to this Motion), it is Partington's claim in paragraph 107 that the proceedings violate and deny him his right to due process of law under the Fifth Amendment to the United States Constitution. The Rule 13 prosecutor believes this is what Partington referred to when he talked of the invasion of his Fifth Amendment rights. Partington deposition at 4.

And, the attached Affidavit of the Rule 13 prosecutor establishes that Partington now admits that he was not invoking *his* Fifth Amendment self-incrimination privilege. Of course, the privilege is personal, and Partington may not invoke it on someone else's behalf, or on the ground that his testimony would implicate another. *See State v. Narvaez*, 68 Haw. 569, 573 (1986); *Rakas v. Illinois*,

439 U.S. 128, 140 n.8 (1978); *Bellis v. United States*, 417 U.S. 85, 89-90 (1974); *Rogers v. United States*, 340 U.S. 367 (1951).

The Rule 13 prosecutor requests this Court to reconsider its Order, and to consider the merits of the claims raised by the Rule 13 prosecutor. The Rule 13 prosecutor asks this Court to rule on the merits that Partington *must* answer all the questions asked of him by the Rule 13 prosecutor, unless he specifically states on the record that he is refusing to answer those questions pursuant to *his* Fifth Amendment privilege against self-incrimination.

With the record as it currently stands, Partington will be able to claim that this Court never adjudicated the question of the waiver of Clarke's lawyer-client privilege, and thus there was never a ruling that the privilege had been waived. Partington will likely claim that the Court misconstrued his Fifth Amendment argument, that he was never asserting his privilege against self-incrimination, and that in the absence of a court ruling that the lawyer-client privilege had been waived, he had no opportunity or right to "defend himself."

WHEREFORE, the Rule 13 prosecutor respectfully asks this Court to reconsider its Order of may 15, 1990.

DATED: Honolulu, Hawaii, May 16 1990

/s/ Mark J. Bennett
MARK J. BENNETT
Rule 13 Prosecutor

APPENDIX "N"

NO. 10041
IN THE SUPREME COURT OF THE
STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	CR. NO. 59285
IN RE: EARLE A. PARTINGTON	

FILED
1990 MAY 23 P 1:42
Eugene L. Sabado
CLERK SUPREME COURT

ORDER

Upon consideration of the Motion for Reconsideration filed by the Rule 13 Prosecutor,

IT IS HEREBY ORDERED that the motion is denied.

IT IS FURTHER ORDERED that attorney Partington's "Motion for Disqualification or Recusal of Justices . . . and for Appointment of Substitute Justices to Hear Mark J. Bennett's 'Motion for Reconsideration . . . '" is denied.

DATED: Honolulu, Hawaii, May 23, 1990.

FOR THE COURT:

/s/ H. Lum
Chief Justice

[seal]

APPENDIX "O"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN and HOWARD T. CHANG, together with their successors in office, Defendants-Appellees.	NO. 87-2375 DC# CV-87-0172-ACK Hawaii ON EMERGENCY MOTION TO RECALL MANDATE, TO AMEND THE COURT'S OPINION, AND FOR TEMPORARY RESTRAINING ORDER

[Filed April 30, 1990]

PLAINTIFF-APPELLEE'S MOTION FOR* IMPOSITION OF RULE 11 SANCTIONS

Plaintiff-Appellee Earle A. Partington pro se respectfully moves this Honorable Court for imposition of sanctions against Defendants-Appellees Gedan and Mark J. Bennett (as successor to Howard T. Chang) in their personal capacities for deliberate misrepresentations in their "State Official's Memorandum in Opposition to Plaintiff's Emergency Motions (Including Suggestion of

*Cover, declaration, exhibits and certificate deleted in printing.

Mootness Due to Waiver of Attorney Client Privilege)" dated April 26, 1990.

This motion is made pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27-1 and is abased upon Rule 11 of the Federal Rules of Civil Procedure as incorporated into Circuit Rule 1-1, the inherent power of the court, the attached Memorandum of Points and Authorities, the attached declaration of Earle A. Partington, exhibits A and B, and the record and file in this case.

DATED: Honolulu, Hawaii, April 28, 1990.

/s/ Earle A. Partington
EARLE A. PARTINGTON
Plaintiff-Appellant pro se

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, vs. JOSEPH M. GEDAN and HOWARD T. CHANG, together with their successors in office, Defendants-Appellees.	)	NO. 87-2375 DC# CV-87-0172-ACK Hawaii ON EMERGENCY MOTION TO RECALL MANDATE, TO AMEND THE COURT'S OPINION, AND FOR TEMPORARY RESTRAINING ORDER

MEMORANDUM IN SUPPORT OF MOTION FOR IMPOSITION OF RULE 11 SANCTIONS AND IN REPLY TO DEFENDANTS-APPELLEES' OPPOSITION TO "EMERGENCY MOTION TO RECALL MANDATE, TO AMEND THE COURT'S OPINION AND FOR TEMPORARY RESTRAINING ORDER"

I. REPLY TO DEFENDANTS-APPELLEES' OPPOSITION

Plaintiff-Appellant Partington moved this court to recall and clarify its mandate in order to determine the jurisdiction of the district court to hear a FRAP 60(b) motion and to determine the capacity in which the sanctions are to be awarded. In the same motion, Partington seeks a temporary restraining order to maintain the status quo. In response, Defendants-Appellees (hereinafter "Gedan and Bennett") are attempting to litigate the entire FRAP 60(b) motion in this court instead of in the district court where it belongs. Although Partington's emergency

motion requires some discussion of whether a TRO should issue, there is no justification for Gedan and Bennett burdening the court with the massive papers they submitted.[1] Gedan and Bennett fail to advance even one cogent reason why the mandate should not be recalled and clarified for the benefit of the district court.

A good portion of Gedan and Bennett's mootness arguments are also premised on serious factual misrepresentations contained in their "State Official's Memorandum in Opposition to Plaintiff's Emergency Motions (Including Suggestion of Mootness Due to Waiver of Attorney Client Privilege)" dated April 26, 1990 (hereinafter "SOL").

II. SUPPORT OF MOTION FOR IMPOSITION OF RULE 11 SANCTIONS

Serious misrepresentations by Gedan and Bennett in the SOL merit the imposition of sanctions by this court, for the following reasons.

A. Failure to disclose material facts.

Included in Exhibit 1 of the SOL is a purported waiver of the attorney-client privilege by Partington's former client Clarke in *State v. Clarke*. Gedan and Bennett

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[1] Defendants-Appellees' counsel, who signed the SOL, is the same counsel taken to task by this court in *Robinson v. Ariyoshi*, 854 F.2d 1189, 1190 (9th Cir. 1988), for conduct similar to that complained of here.

claim that the waiver moots significant parts of Partington's constitutional claims. Gedan and Bennett fail to tell the whole truth. A reading of the transcript included in Exhibit 1 of the SOL and Partington's declaration attached hereto shows that Clarke's present court-appointed attorney, Christopher R. Evans, together with Bennett, met with Clarke where he is incarcerated and had him sign a purported waiver of the attorney-client privilege as to his communications (during the trial in *State v. Clarke*) with Partington. In so acting, Evans abandoned his duty to Clarke and became an agent of Bennett, whose interests by no means coincide with those of Clarke.

Partington reported Evans' breach of duty to Clarke to the Office of Disciplinary Counsel of the Supreme Court of Hawaii as well as to the Criminal Administrative Judge of the Circuit Court of the First Circuit, State of Hawaii, who is responsible for the appointment of counsel for indigents accused of felonies here. No later than April 25, 1990, Bennett knew of these complaints by Partington.

It is undisputed that neither Clarke nor his attorney Evans knows what Partington would reveal if Clarke validly waives the attorney-client privilege. Evans failed to determine what Partington would say thereby rendering it impossible to disclose to Clarke what the consequences of Partington's disclosure might be. In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the Supreme Court stated:

> It has been point out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights."

Clearly then, there has been no valid waiver of the attorney-client privilege by Clarke.

Further, regardless of whether Clarke waive the privilege as to himself, Partington's duty to maintain the privilege remains unaffected. DR 4-101(C)(1) of the Hawaii Code of Professional Responsibility provides that a lawyer may reveal "[c]onfidences or secrets with the consent of the client or clients affected, but only after full disclosure to them." Therefore, Partington's revelation of Clarke's confidences without compliance with DR 4-101(C)(1) could subject Partington to discipline for breach of his duty to Clarke. Partington must be especially careful in this regard because Evans, in an affidavit dated March 10, 1987, for the instant case (see Exhibit A hereto (from ER 422-23)), instructed Partington on behalf of Clarke to invoke the attorney-client privilege.[2]

These facts and law were well known to Gedan and Bennett and to their counsel when they submitted their SOM on April 26, 1990. Yet no mention whatsoever is made of any of these matters. It is difficult, if not impossible, to believe their failure to disclose was other that intentional.

B. Misrepresentations of facts.

Gedan and Bennett claim (SOM at 35) that Partington has notice of the allegations against him in the purported

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[2] In the same affidavit, Evans represented that "Mr. Clarke is quite satisfied with the representation he received from [Partington]" and that Clarke "has no complaint against [Partington] for his handling of Clarke's first trial[.]"

HSCR 13 proceeding because Gedan drew Partington's attention to the specific allegations contained in the opinion of the Supreme Court of Hawaii in *State v. Clarke*. Further, they state (SOM at 45) that "Partington, since mandate has issued, has been provided greater specificity in the charges against him[.]"

However, as Gedan and Bennett and their counsel well know, Gedan ruled on April 18, 1990, at a prehearing conference in the purported HSCR proceeding, that there are *no* charges or allegations pending against Partington, and, indeed, that the purpose of the purported HSCR 13 proceeding was to determine at its conclusion whether charges are to be brought. Finally, the opinion of the Supreme Court of Hawaii in *State v. Clarke* contains no allegations. Instead, the opinion made specific *findings* against Partington without specifying any rule or law violated. Here again, Gedan and Bennett are attempting to mislead this court.

C. Misrepresentation of Partington's position.

Gedan and Bennett claim (SOM at 39) that "Partington virtually concedes that the Rule 13 action was not 'brought' in bad faith." As Partington stated on May 29, 1987, in a reply filed in the district court, he *did not know* why the proceeding was initiated against him and therefore could not say whether or not it was brought in bad faith. At no time has Partington ever conceded that the purported HSCR 13 proceeding was not brought in bad faith.

What makes this representation particularly egregious, is that on April 16, 1990, Partington filed a motion[3] for imposition of Rule 11 sanctions in the district court in this case for, *inter alia*, the identical misrepresentation. See Exhibit B hereto. For Gedan and Bennett to repeat this misrepresentation while a sanctions motion is pending in the district court of the identical misrepresentation is incredible.

CONCLUSION

Unfortunately, Defendant's-Appellees in this case have a history of making misrepresentations to the district court, this court, and the Supreme Court of the Untied States (see exhibits A and B within Exhibit B attached hereto). Such misrepresentations waste the court's time, as well as counsel's time and inhibit the administration of justice. The time has come to impose sanctions as a deterrence.

DATED: Honolulu, Hawaii, April 28, 1990.

/s/ Earle A. Partington
EARLE A PARTINGTON
Plaintiff-Appellant pro se

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[3] Inexplicably, this motion is missing from the two-and-a-half-inch thick stack of memorandum and exhibits that is the SOM.

APPENDIX "P"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARLE A. PARTINGTON, Plaintiff-Appellant, -vs- JOSEPH M. GEDAN; HOWARD T. CHANG, Defendants-Appellees.	No. 87-2375 D.C. No. CV-87-0172-KAY *ORDER DENYING MOTIONS* (Filed May 11, 1990)

Appeal from the United States District Court
for the District of Hawaii

Before: WALLACE, REINHARDT, and NOONAN, Circuit Judges.

Appellant's emergency motion to recall mandate, to amend the court's opinion, and for temporary restraining order is denied. Appellant's motion for imposition of rule 11 sanctions is also denied.